No. 94-477

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LEISURE TIME PRODUCTIONS, B.V.,
Petitioner,

v.

TRI-STAR PICTURES, INC., COLUMBIA PICTURES INDUSTRIES, COLUMBIA PICTURES ENTERTAINMENT, INC., HORIZON PICTURES, G.B., ACADEMY PICTURES, A.G., and DAVID N. BOTTOMS and HON. RAYA S. DREBEN, as Executors of the Estate of SAMUEL SPIEGEL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR BRUCE BERESFORD, ARTHUR BRAUNER, CLAY BLAIR, JOAN BLAIR, TIMOTHY BOTTOMS, ARTHUR COHN, RICHARD FLEISHER, EDWARD FOX, SHARON HAREL, ARTHUR KANANAK, NORMAN KATZ, IRVING KIRSHNER, KITARO, HOWARD KOCH, ARNOLD KOPELSOHN, DAVID KORDA, PAUL MAYERSBERG, ANDREW McLAGLEN, ANDRE MORGAN, CHRISTOPHER PENN, PRODUCERS ALLIANCE FOR CINEMA & TELEVISION, NICHOLAS ROEG, AL RUDDY, WALTER SHENSON, LALO SCHIFRIN, PETER STRAUSS, GEORGE TAKAI, SARGON TAMIMI, MICHAEL WAYNE, AND ROBERT WISE AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Bruce Beresford, Arthur Brauner, Clay Blair, Joan Blair, Timothy Bottoms, Arthur Cohn, Richard Fleisher, Edward Fox, Sharon Harel, Arthur Kananak, Norman Katz, Irving Kirshner, Kitaro, Howard Koch, Arnold Kopelsohn, David Korda, Paul Mayersberg, Andrew McLaglen, Andre Morgan, Christopher Penn, Producers Alliance for Cinema & Television, Nicholas Roeg, Al Ruddy, Walter Shenson, Lalo Schifrin, Peter Strauss, George Takai, Sargon Tamimi, Michael Wayne, and Robert Wise respectfully submit this brief as amici curiae in support of petitioner in this case. Counsel for petitioner and counsel for respondents have consented to the filing of this brief.*

INTEREST OF THE AMICI CURIAE

The Producers Alliance for Cinema & Television represents approximately 1,300 British film producers and producing companies, which have made thousands of motion pictures that have been distributed throughout the world.

Bruce Beresford, Arthur Brauner, Arthur Cohn, Richard Fleisher, Sharon Harel, Irving Kirshner, Howard Koch, Arnold Kopelsohn, Andrew McLaglen, Andre Morgan, Nicholas Roeg, Al Ruddy, Walter Shenson, Peter Strauss, and Robert Wise are film directors and producers. These amici include past presidents of the Academy of Motion Picture Arts and Sciences, and members of the Producers Guild of America and the San Juan Island Theatre. Several of these directors and producers are recipients of screen and stage production awards in the United States,

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* Letters granting consent by counsel for petitioner and counsel for respondents have been filed with the Court. Horizon Pictures, G.B., Academy Pictures, A.G., and David N. Bottoms and Hon. Raya S. Dreben, as Executors of the Estate of Samuel Spiegel are no longer parties to this action, despite their inclusion as respondents in petitioner's caption. A letter from their counsel indicating their lack of a position has been filed with the Court.

Great Britain, and Australia, including Academy Awards, the Jean Hersholt Humanitarian Award, and the Fellowship of the British Film Institute.

Other film executives among the amici are Norman Katz, past president of the American Film Market Association; David Korda, president of Capella Films; and film producer Michael Wayne, president of Batjac Productions, a film production company formed by John Wayne. In addition, Arthur Kananak is a motion picture distributor and the former president of Viacom Enterprises, a company that produces and distributes motion pictures.

Timothy Bottoms, Edward Fox, Christopher Penn, and George Takai are screen actors, all who appear in the film "Return from the River Kwai." Kitaro and Lalo Schifrin are composers. Mr. Schifrin also is a member of the American Federation of Musicians, the Conductors Guild, and the Sreen Composer Society.

Clay Blair has written 24 books and is a former Editor-in-Chief of the *Saturday Evening Post*. Clay and Joan Blair are the authors of the book *Return from the River Kwai*, which was made into a film by Leisure Time Productions, B.V. Other writers included in the amici are Paul Mayersberg, a screenwriter and novelist, and Sargon Tamimi, a screenwriter.

Because amici all have some involvement in the motion picture industry, they frequently are parties to contracts with large film studios and other distributors of motion pictures. Each of these individuals and associations is vitally concerned with a broad array of legal issues that affect the motion picture industry. This case, in particular, presents a question of great importance to the film entertainment community that will be immediately affected. Moreover, this case potentially will affect all persons who do business by domestic or international contractual agreements.

As petitioner explains, the decision by the Court of Appeals to grant summary judgment to the film distribu-

tor may have altered the balance in the motion picture industry between distributors and producers of films. On a broader scale, it could alter the bargaining power of all sellers and distributors of goods. In addition to creating authority for breaching distribution contracts, the decision creates substantial uncertainty within any commercial industry as to the burden that must be overcome to prove that a product is completely free of any potential claim that might arise and affect the distributor, no matter how slight the possibility. Because the producers of goods, including motion pictures, can ill afford the costs of such uncertainty—and because such costs are legally unwarranted—we respectfully ask this Court to grant Leisure Time's petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1986, Leisure Time Productions, B.V. ("Leisure Time") and Tri-Star Pictures, Inc. ("Tri-Star") entered into an agreement that obligated Tri-Star to distribute throughout North America a motion picture to be produced by Leisure Time, entitled "Return from the River Kwai." Leisure Time, *inter alia*, agreed to provide the film free of claims that would materially impair the rights of Tri-Star. A dispute arose between the parties as to whether the film in fact was free of claims at the time Tri-Star was to distribute it, and, despite the film's successful, unimpeded distribution overseas, Tri-Star refused to distribute the film in North America.

In the ensuing litigation, rather than sending the issue of whether the film was free of claims to a jury for a factual determination, the Federal District Court for the Southern District of New York granted summary judgment to Tri-Star, ruling that as a matter of law Leisure Time could not provide the film free of claims to Tri-Star, and dismissing Leisure Time's contract claims against Tri-Star. A three-judge panel of the United States Court of Appeals for the Second Circuit affirmed the District Court's grant of summary judgment, allowing Tri-Star to walk away from its motion picture distribution agreement with

Leisure Time. *Tri-Star Pictures, Inc. v. Leisure Time Productions, B.V.*, 17 F.3d 38 (2d Cir. 1994).

Amici respectfully submit that the Court of Appeals' ruling has altered the bargaining power of members of the motion picture industry, in particular, producers and distributors of films. In addition, on a larger scale, the decision has diminished the bargaining power of all persons who contract with others to distribute a product. Indeed, it is difficult to conceive of any product that its maker can warrant is and forever will be perfect. It is illogical, and contrary to law, to allow the distributor of a product to terminate a contract because the producer could not anticipate that a specious claim might be raised against it.

ARGUMENT

This case involves the application of Federal Rule of Civil Procedure 56, regarding summary judgment, to a contractual dispute. Application of Rule 56 to the particular dispute in question is important for the construction of contracts that involve an obligation to provide a product free of claims, and is aided by an understanding of the burden of proof imposed by the U.S. Court of Appeals for the Second Circuit on the parties to the underlying contract in this case. The Court of Appeals has taken an approach to summary judgment that is contrary to Rule 56, and which conflicts with the approach taken by other federal courts of appeal.

I. THE QUESTIONS PRESENTED HAVE POWERFUL AND RECURRING IMPLICATIONS FOR ALL SEGMENTS OF THE MOTION PICTURE INDUSTRY

The motion picture industry is comprised not only of large film studios and well-known producers, but also includes smaller-scale producers and producers of films for specialty markets, investors, actors' guilds, composers, directors, theaters, agencies, and unions of almost every group of employees in the industry, from lighting crews to makeup artists. The film business is a major source of

jobs and represents a key segment of the U.S. economy, especially on the West Coast, which is the center of the entertainment industry. Many segments of the motion picture industry potentially will be affected by the disruption of the balance of power between film studios and the people involved in the production of motion pictures.

The Court of Appeals' decision will chill, and may well paralyze, the motion picture industry by removing the only protection makers of films have against those with the power and authority to distribute their product. The ability to rely on distribution agreements is critical to the decsion by producers and investors to commit substantial time, effort, and funds to producing a motion picture. And those decisions, in turn, affect the industry as a whole.

By resolving this contractual dispute in Tri-Star's favor on summary judgment, however, the Court of Appeals has sent a signal to film studios that it is acceptable to breach distribution contracts upon the slightest intimation of a claim—whether it be a stale claim of trademark infringement or a specious claim of defamation—no matter how groundless. By rendering such contracts breachable and unenforceable, the Court of Appeals has opened the door to censorship and intimidation by film studios and distributors. In so doing, the Court of Appeals also may have ensured that few, if any, producers will fund a motion picture if it means chancing that it may never be distributed.

II. THE DECISION BELOW DEPARTS FROM WELL-ESTABLISHED PRINCIPLES OF FEDERAL CIVIL PROCEDURE AND CONFLICTS WITH DECISIONS IN OTHER CIRCUITS

The Court of Appeals has effectively turned federal summary judgment procedure on its head, by requiring a party opposing a motion for summary judgment to prove, as a matter of law, that its defenses will succeed.

As the petitioner more fully sets forth, Federal Rule of Civil Procedure 56 plainly requires that it is the moving

party's burden to "show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Other circuit courts agree. *See Quintero de Quintero v. Aponte-Rogue*, 974 F.2d 226, 227-28 (1st Cir. 1992); *Big Apple BMW, Inc. v. BMW of N. America, Inc.*, 974 F.2d 1358, 1362-63 (3d Cir. 1992); *Pulliam Investment Co., Inc. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir. 1987); *South Central Bell Telephone Co. v. Canal Place Ltd. Partnership*, 927 F.2d 867, 868 (5th Cir. 1991); *O-So Detroit, Inc. v. Home Insurance Co.*, 973 F.2d 498, 505 (6th Cir. 1992); *LaScola v. U.S. Sprint Communications*, 946 F.2d 559, 563 (7th Cir. 1991); *Honeywell, Inc. v. United States*, 973 F.2d 638, 641 (8th Cir. 1992); *E.E.O.C. v. Ratliff*, 906 F.2d 1314, 1317 (9th Cir. 1990); *Shebester v. Triple Crown Insurers*, 974 F.2d 135, 139 (10th Cir. 1992); *St. Paul Fire & Marine Insurance Co. v. Tinney*, 920 F.2d 861, 862 (11th Cir. 1991); *Bias v. Advantage International, Inc.*, 905 F.2d 1558, 1560 (D.C. Cir.), *cert. denied*, 498 U.S. 958 (1990); *Meyers v. Asics Corp.*, 974 F.2d 1304, 1306-07 (Fed. Cir. 1992). In most circuits, the non-moving party need not prove in its favor each issue of material fact. *See, e.g., Russ v. International Paper Co.*, 943 F.2d 589, 591 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1675 (1992); *Reich v. ConAgra, Inc.*, 987 F.2d 1357, 1359-60 (8th Cir. 1993).

Contrary to these rules, the U.S. Court of Appeals for the Second Circuit held that, because Leisure Time, the non-moving party, could not demonstrate as a matter of law that its product was free of all claims (*i.e.*, that the potential trademark claim against the film was invalid because it was barred by laches and because the trademark effectively was owned by Tri-Star), Tri-Star was entitled to terminate the distribution agreement. *Tri-Star Pictures, Inc. v. Leisure Time Productions, B.V.*, 17 F.3d at 44-45. Indeed, the Court of Appeals even recognized that there were disputed issues of material fact as to

whether laches would bar the trademark action. *Id.* at 44.

The conclusion that material factual issues were the subject of genuine dispute should have resulted in a reversal of the District Court's grant of summary judgment. Indeed, other federal courts have found that both laches and trademark infringement are factual issues to be decided on summary judgment only in the most extraordinary circumstances. *See Levi Straus & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1355 (9th Cir. 1985) (trademark infringement); *Meyers v. Asics Corp.*, 974 F.2d at 1307-08 (laches).

A proper application of the summary judgment standard places the burden on the moving party, Tri-Star, to show that laches, as a matter of law, *would not* bar the potential trademark claim. Similarly, a proper application of the summary judgment standard requires the moving party to show that, as a matter of law, it *did not* already own the trademark at issue. Moreover, to succeed on summary judgment, the moving party should be obligated to show that there were no disputes of material fact as to the likely success of a potential trademark claim. The Court of Appeals' decision conflicts with other federal cases that say just that. *See Ameritech, Inc. v. American Information Technologies Corp.*, 811 F.2d 960, 964-67 (6th Cir. 1987) (likelihood of confusion regarding ownership of subsidiary who owned trademark rights); *Levi Straus & Co. v. Blue Bell, Inc.*, 778 F.2d at 1355 (likelihood of confusion between goods); *Coach House Restaurant, Inc. v. Coach and Six Restaurants, Inc.*, 934 F.2d 1551, 1559-60 (11th Cir. 1991) (summary judgment reversed as to acquisition of trademark rights).

The panel's own ruling that there are factual questions concerning the validity of the potential trademark claim should have made it impossible for the Court of Appeals to rule that Tri-Star had met its burden as the moving party. For this reason, this Court should grant Leisure Time's petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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